U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

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U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

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FILE: EAC 03 085 51379 Office: VERMONT SERVICE CENTER Date: AUG 24 2005

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mari Johnson

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment in the field of medicinal chemistry. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. [redacted] (November 29, 1991), states:

> The Service [now Citizenship and Immigration Services] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The petitioner describes her work:

> [At the University of New Hampshire] I accomplished the first synthesis of extraordinary new organic substances containing only hydrogen and carbon atoms. I found organic molecules to undergo many fascinating reactions. I employed the emission of ultraviolet light to develop new routes to prepare molecules that exist for a short time. These short-lived molecules are among the most fundamental substances in the reactions of carbon compounds. . . . This work was recognized in Chemical & Engineering News, the most prestigious weekly magazine in the United States within these fields for its useful contributions to the physical organic chemistry theory. . . .
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> In the fall of 1997, I . . . join[ed] Dr. [redacted] Laboratory of Medicinal Chemistry (LMC) at the National Cancer Institute. The LMC works at the interface of chemistry and molecular biology, conducting research directed at the discovery and development of new anticancer and anti-HIV drugs. . . .
>
> My research has focused on . . . the design, synthesis and spectroscopic characterization of a number of chosen chemical substrates to study the mechanism for the addition of water, mediated by the enzyme adenosine deaminase (ADA), to biological substrates such [as] adenosine. . . . The results of my research have reve[a]led important insights into the structural requirements of a substrate for its interaction with the enzyme ADA. Have [sic] surely answered integral questions about the mechanism for the addition of water, mediated for the enzyme adenosine deaminase, to biological substrates, thus advancing our understanding in the rational design of drugs for the prevention and treatment of lymphoproliferative cancers.

The petitioner earned her doctorate at the University of New Hampshire (UNH) between 1993 and 1998, and worked as a postdoctoral fellow at the National Cancer Institute, Frederick, Maryland (NCI-Frederick) from March 1999 to June 2002.

The petitioner's initial submission includes letters from four witnesses, all of whom are either UNH faculty members or NCI-Frederick researchers. UNH Professor [redacted] states:

> [The petitioner] has made significant contributions in the discovery of 1,2,3-cyclooctatriene, a record-breaking strained organic species that was previously unknown. Her successful work on the generation of vinylides and vinylcarbides represents a seminal advance in the important field of carbene chemistry. Her method of generation of these from phenanthrene precursors by photochemistry has given the research community a reliable and convenient way of producing these critical intermediates. These are now benchmarks for the study of the chemistry of unstable organic molecules.

Professor [redacted], who supervised the petitioner's doctoral studies at UNH, states that the petitioner has "developed into a superb scientist," but he does not discuss the petitioner's work or its impact in any detail.

Dr. [redacted], chief of the Laboratory of Medicinal Chemistry at NCI-Frederick, was the petitioner's supervisor during her postdoctoral fellowship. He states:

> In my laboratory, [the petitioner] was responsible for implementing a new synthetic methodology in the field of nucleoside chemistry for the development of compounds designated as antitumor and antiviral agents. . . . [The petitioner's] research continued with the syntheses of compounds designed to study the importance of molecular changes in relation to their effect on critical biological pathways that control the therapeutic outcome of these agents. . . . Finally, toward the end of her stay, [the petitioner] tackled the highly complex synthesis of a natural product analogue known for its potent anticancer modulating activity that is synergistic with a group of conventional anticancer and anti-AIDS drugs. . . .
>
> I consider [the petitioner] to be an outstanding member of the scientific research profession.

Dr. [redacted], head of Bioorganic and Medicinal Chemistry at NCI-Frederick's Laboratory of Medicinal Chemistry, states that postdoctoral fellowships at the National Institutes of Health are widely coveted positions, and that the petitioner "completed a number of challenging and cutting-edge projects" with "highly significant" results.

The petitioner submits a photocopied page from the April 13, 1998 issue of *Chemical & Engineering News*, which begins: "Researchers at the University of New Hampshire, Durham, have devised what may become a general method for designing carbenes to order and generating them as needed." The article identifies the petitioner and three other collaborators. The article also describes related experiments undertaken by "investigators at Boston College, Chestnut Hill, Mass." The 1998 article states that the technique "may become a general method for designing carbenes," but the record is devoid of follow-up documentation to establish that it *did* in fact become a general method following its announcement in 1998, nearly five years before the petition was filed in January 2003.

With regard to her published work, the petitioner submits documentation showing that independent researchers have cited one of her published articles five times since its publication in 1996. This record of roughly one citation per year does not readily indicate that the petitioner's work has been unusually influential within her field. An exhibit list submitted with the initial filing refers to evidence of citation of a second article, but these materials are not in the record.

The director denied the petition, stating that the petitioner has not established that her work has had a particularly significant impact on the field of organic chemistry. The director, in denying the petition,

concluded that the petitioner has not shown that her work is national in scope. Medical and scientific research at major institutions is inherently national in scope, because the results are disseminated nationally (and internationally) through publications and conferences and because the findings of such research tend to apply universally rather than only locally. We therefore withdraw the director's finding that the petitioner's work lacks national scope.

On appeal, counsel asserts that the director erred by failing to issue a request for evidence (RFE) as required by 8 C.F.R. § 103.2(b)(8), and that the denial should be withdrawn so that the director may issue such a request. In arguing that the director should have issued an RFE, counsel repeatedly refers to "the Yates memo," referring to a memorandum from [redacted] Associate Director of Operations, *Requests for Evidence* (May 4, 2004). That memorandum has since been rescinded and superseded by a new memorandum, *Requests for Evidence (RFE) and Notices of Intent to Deny (NOID)* (February 16, 2005). In the new memorandum, Mr. [redacted] indicates "issuance of a RFE or NOID is usually discretionary" in instances where the record contains the minimum required evidence (which is the case here). Issuance of an RFE under such circumstances is "recommended" rather than *required*; thus, the director's failure to issue an RFE is not a reversible error that warrants a remand to the Service Center.

We note, furthermore, that the issuance of an RFE is not the only opportunity for a petitioner to supplement the record. A petitioner may also submit additional evidence on appeal. In this instance, the petitioner filed a skeletal appeal, including only the assurance that a further submission would be forthcoming. When the petitioner later provided that further submission, it consisted only of a brief from counsel. Counsel does not specify what additional evidence the petitioner would have submitted in response to an RFE, nor does counsel explain why the petitioner has not simply submitted that same evidence on appeal.

Counsel states: "When she filed this application, it should be noted that [the petitioner] was working at the National Institutes of Health." The record does not support this assertion. The petition was filed in January 2003. On the I-140 petition form, the petitioner listed an address in Bogotá, Colombia, and indicated "N/A" (not applicable) in the spaces marked "Date of Arrival" and "Current Nonimmigrant Status." Thus, the petitioner was not even in the United States at the time of filing. The petitioner's Form ETA-750B Statement of Qualifications, accompanying the petition, indicated that the petitioner's employment at the National Institutes of Health ended in June 2002. The Form ETA-750B instructs the alien to "List all jobs held during the past three (3) years." Although the petitioner signed the ETA-750B in November 2002, the document contains no reference to any employment after June 2002. This lengthy period of claimed unemployment does not, on its face, readily suggest significant demand for the petitioner's services.

The evidence of citation of the petitioner's work is incomplete, but as described by counsel, this citation rate would not guarantee the approval of the petition. The record identifies three published articles by the petitioner and accounts for four years of employment in the seven years since she received her doctorate. All of the witnesses who have offered letters of support have worked with her directly. None of this demonstrates that the petitioner stands above her peers in the field to an extent that would justify the special benefit of a national interest waiver, which is an immigration benefit above and beyond classification as a member of the professions holding an advanced degree. Counsel, on appeal, relies upon numerous claims which are either exaggerated or false.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual

alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.